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No. 88-352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SENATOR GORDON J. HUMPHREY, *et al.*,
Petitioners,

v.

NICHOLAS F. BRADY,
Secretary of the Treasury, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF CERTIORARI

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1. The principal reason for submitting this reply brief is to call the Court's attention to another case that it has agreed to hear which, like this case, presents a delegation question. In *Burnley v. Mid-America Pipeline Co.*, No. 87-2098 (Probable Jurisdiction Noted, October 3, 1988), the district court struck down a federal statute on undue delegation grounds. Although the statutory scheme at issue in *Burnley* is somewhat different from that at issue here — *Burnley* involves a statute that generates revenue for the federal government, whereas this action involves a statute which determines the rate of pay for high-ranking federal officials — the legal theories underlying both cases are the same: namely, that Congress failed to provide the decision-maker with the "intelligible principles" needed to make the determinations required under the statute. Given the similarity of issues, we submit that it would be desirable for the Court to consider the two cases together.

To be sure, there are differences in the legal arguments advanced by the parties and in the statutes themselves, but that only heightens the reasons for granting review in this case as well. Thus, in *Burnley*, the appellee relies heavily on the claim that the revenue-generating feature of the statute is in fact a tax in order to distinguish a number of other delegations upheld under seemingly analogous statutes, while here petitioners argue that the Ascertainment Clause of the Constitution provides a substantive limit on Congress' power to delegate determinations relating to congressional salaries. In addition, there are other differences between the two statutes, such as the different procedures by which the respective determinations are made. Moreover, judicial review is available under the *Burnley* statute, at least in some circumstances, while the Federal Salary Act at issue here has no judicial review provision, and the "deems advisable" language in it would render judicial review meaningless as a practical matter even if it were available.

But these differences counsel in favor of addressing the two cases in tandem. By considering the core legal question presented in both cases at the same time, the Court would have a far broader context for examining this vital question of constitutional law and a greater opportunity to give guidance to the lower courts and litigants. *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), and *In re Primus*, 436 U.S. 412 (1978) (two lawyer solicitation cases argued and decided together).[1]

2. With respect to the Ascertainment Clause argument, the Secretary recognizes that the question is whether the "'ultimate

[1]The petition in *Florida Power and Light Co. v. United States*, No. 88-234, raising issues very similar to those in *Burnley*, was before the Conference last week, but no action was announced on November 7, 1988, presumably because the petition is being deferred pending the outcome in *Burnley*, as the Solicitor General suggested. By contrast this case is unlikely to be resolved by reference to *Burnley* because of the distinctions described above.

authority' over, and thus responsibility for, Congress's compensation remains with Congress." Opp. at 11. The Secretary claims that the test is met here, just as it was in *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976), *aff'd*, 434 U.S. 1028 (1978), even though Congress could prevent the pay increase by use of a one-House veto in *Pressler*, while here Congress must pass a statute and override a certain presidential veto within 30 days after the President announces his decision. In other words, according to the Secretary, there is no difference between passing a law and exercising a one-House veto. If that were the case, then all of the battles leading to this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), were much ado about nothing. Neither the history of the legislative veto, nor of the various changes in the Salary Act described in our petition (pp. 3-7), in any way supports the notion that the two override mechanisms are equivalent for any purpose, let alone in order to satisfy the Ascertainment Clause.

3. Finally, with respect to the justiciability issues, the Court need not decide whether they would have warranted review independently because, if the Court decides to hear the merits, petitioners recognize that they must establish their right to maintain this action. Nevertheless, the Solicitor General's detailed discussion of his disagreement with the D.C. Circuit's doctrine of "equitable discretion," and his contention that, even in this situation, Members of Congress lack standing to challenge the denial of their constitutional rights, speaks eloquently of the need for this Court to review the question of the right of Members of Congress to maintain actions such as this. Similarly, his discussion of taxpayer standing only proves that taxpayers have not in the past been allowed to bring suits such as this, but does not establish that they fall outside the ambit of taxpayer standing authorized by this Court in *Flast v. Cohen*, 392 U.S. 83 (1968).

For the foregoing reasons and those set forth in the petition, the Court should grant the writ of certiorari.

Respectfully submitted,

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